No. 10415

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES T. TAKAHASHI and EDWARD Y. OSAWA,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANTS

SAMUEL B. BASSETT,
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STATEMENT CONCERNING JURISDICTION

The appellants were indicted (Tr. 2) and convicted (Tr. 20) for violation (1) of Section 88, Title 18, U.S.C.A., and (2) of Section 6 of the Executive Order approved by the President March 15, 1941, effective April 15, 1941, promulgated pursuant to Section 99, Title 50, U.S.C.A., and (3) of Section 80, Title 18, U.S.C.A.

The jurisdiction of the District Court is sustained by the provisions of Title 28, Section 41, Sub. 2, U.S.C.A., and the jurisdiction of this court by the provisions of Title 28, Section 723(a) U.S.C.A., and the rules promulgated by the Supreme Court of the United States pursuant thereto.

ABSTRACT OF THE CASE

The appellants Charles T. Takahashi and Edward Y. Osawa (together with three others, all residents of Japan and never apprehended) were charged in an indictment having three counts with the following offenses:

COUNT I. A conspiracy (in violation of Sec. 88, Title 18, U.S.C.A.).

(a) To violate Section 6 of an Executive Order approved by the President, March 15, 1941, effective April 15, 1941, promulgated pursuant to Section 99 of Title 50, U.S.C.A., which Section 6 reads as follows:

"The country designated on the application for license as the country of destination shall in each case be the country of ultimate destination. If the goods to be exported are consigned to one country with the knowledge that they are intended for trans-shipment thence to another country, the latter country shall be named as the country of destination," it being alleged to be the plan, purpose and object of such conspiracy to cause China to be designated on an application for license to export three new storage tanks as the country of destination, whereas the country of ultimate destination was Japan; and further,

(b) To violate Section 80 of Title 18, U.S.C.A., by causing to be made in said application false and fraudulent statements, such statements being made in a matter within the jurisdiction of the Department of State.

COUNT II. Violation of said Paragraph 6 of said Presidential order by filing said application.

COUNT III. Violation of said Section 80 of Title 18, U.S.C.A., by the same act of filing.

(Indictment R. 2)

The jury trying the case returned a verdict of guilty as to both defendants on all three counts of the indictment (R. 20)

Motion for a new trial was filed, argued and overruled.

The court rendered judgment and sentence upon the verdict as follows:

Takahashi, 2 years on Count I; 2 years on Count II; 5 years on Count III, all sentences to run concurrently (R. 21).

Osawa, 2 years on Count I; 2 years on Count II; 5 years on Count III, all sentences to run concurrently (R. 24).

Each appellant gave notice of appeal (Takahashi, R. 26; Osawa, R. 30).

There is but one record and it encompasses all the evidence given upon the trial, in narrative form.

The rights and contentions of the two appellants being so similar, if not identical, they join in a single brief.

Of the absent defendants—Ikota is a director of Mikuni-Shoko Company and Kohno (alias Chang) is connected with the same company. Kiang is manager of Hua Hsin Company at Shanghai.

The facts developed upon the trial are these:

STATEMENT OF THE FACTS

Appellant Charles T. Takahashi is an American citizen, born in the United States of Japanese ancestry. He is 39 years of age, and has lived in Seattle all his life.

His father arrived in Seattle in 1892, and became engaged in the importing and exporting business to and from the Orient. He died in 1920, and upon his death Charles T. succeeded to the business (R. 176).

The business has been prosecuted for the most part under the firm name of "Charles T. Takahashi & Co.," though appellant is the sole owner. But since 1929 he has also used the name "China Import & Export Company." As this was an assumed name and required registration under the laws of the State of Washington he caused the same to be duly registered in that year (R. 178). The purpose of this second name was a sort of concession to any Chinese customers of sensitive nature who might not care to do business with a concern obviously dominated by Japanese names, and the date of registration is important only because the government proceeded upon the notion that it was of recent occurrence.

Appellant did a general importing and exporting business, mostly with China and Japan, the items of importation being largely fertilizers, while he exported "anything they had a market for," such as lumber, worn rubber tires, metal junk, automobile bearings and mining machinery (R. 177). They had branch offices in Portland, Oakland, Vancouver and Tokyo, and until disrupted by war conditions they did a considerable business (R. 181).

The appellant Edward Y. Osawa is likewise an American citizen of Japanese ancestry. He was born in Seattle, and has lived there all his life. He is 40 years old. The two appellants have known each other since childhood. In 1929 Osawa became employed by Takahashi & Co., and has been so employed ever since, working up to the position of general manager (R. 201).

By 1940 Takahashi & Co. did considerable business in the exportation to Japan of large second-hand oil tanks used for the storage of oil. Their customer was Mikuni-Shoko Company, Limited, which was a "recognized, standard financial concern" in Tokyo (R. 192). Mikuni-Shoko Company would place an order with Takahashi & Co. for a few tanks at a time, and the latter would go into the market here, acquire the tanks, and ship them to Mikuni-Shoko Company at Tokyo. While appellants did not have definite word of mouth information on the subject, it became very evident to them in the course of business that Mikuni-Shoko Company were acting in behalf of the Japanese army or navy, or both (R. 213-214).

Mikuni-Shoko Company thus ordered about 40 of these tanks (R. 183) and most of them had been shipped, when about August, 1940, the United States government promulgated an order inhibiting the export, without special license therefor, of scrap steel to Japan. Takahashi & Co. at this time had some 18 left on hand, and the question arose whether these used tanks were "scrap steel" and required such license. Accordingly, application was made to the proper authorities at Washington for permission to

ship. The application came back with notation thereon, "no license required." The tanks accordingly went forward (R. 188-189, 202).

So much for history.

Then Mikuni-Shoko Company placed an order with Takahashi & Company for eleven new tanks (R. 203). It was impossible to acquire so many, but Takahashi succeeded in placing an order for the manufacture of three of the eleven with the Galamba Supply Company, of Kansas City, Kansas, who in turn sublet the contract to the Graver Tank Company, of East Chicago, Illinois (R. 203). While these three tanks were in process of manufacture a presidential order was promulgated giving citizens ten days to export all outstanding orders, after which time a special license would be required (R. 202).

Realizing that the tanks could not be completed and shipped within the time limited, Takahashi sent Osawa to Washington to try to consummate some legal arrangements whereby the tanks could go forward. Osawa was accompanied by William Shenker, a lawyer from Portland, Oregon, and who was manager of the Takahashi branch office there. In Washington they employed an attorney, Ira S. Ewers, to assist them. The latter did most of the work. He filed two applications for permission to ship the three tanks. The first was abortive for reasons of form. The second was filed some time in March or April, and was rejected. An appeal was taken to some proper department, and with that appeal pending the parties left for home (R. 190).

When they left Washington both Osawa and Shenker were firmly of the opinion that the appeal would avail nothing, and so reported to Takahashi (R. 204; 214-215). All things considered, Takahashi was imbued with the same idea, and further, that all business with Japan was at an end. Accordingly, while the appeal was still pending, he sent Osawa to Tokyo (R. 200).

Osawa was instructed to settle a disputed claim Takahashi & Co. had with a concern in northern China, settle with Mikuni-Shoko Company the matter of the tanks in their complicated situation, and then close the Takahashi office in Tokyo. That done, he was to go on to Shanghai, China, and there make an arrangement with some concern whereby Takahashi & Co. might import from China wood oil much in demand in this country for the making of paint (R. 191-192; 204). And Osawa was armed with a general power of attorney to be used as required.

Arriving in Tokyo, Osawa made a side trip into North China and settled the disputed account there (R. 205). He then settled with Mikuni-Shoko Company concerning the tanks, by returning to them the moneys they had advanced upon the cost thereof, about $70,000.00, and another $71,000.00 received by Takahashi & Co. advance on freight. These payments were effected by an exchange of credit and trading yen for dollars (R. 194-199; 216-217).

That left Takahashi & Co. the owners of the tanks. It also foreclosed Mikuni-Shoko Company from all interest therein. They were out, and further dealings with them were at an end (R. 197).

Having done these things Osawa was now clear of all business in Japan, and he closed the Takahashi & Co. office. He was now ready for his trip to Shanghai. But he did not go to Shanghai. He found that Japan was in control of that port and refused admission to foreigners, of whom they considered Osawa one, as indeed he was, being American-born though of Japanese ancestry (R. 205). He then, quite naturally, appealed to Mikuni-Shoko Company for assistance in getting the representation in Shanghai and they, quite as naturally, agreed to do so (R. 207). After some negotiating by Mikuni-Shoko Company and goings back and forth between Tokyo and Shanghai Mikuni-Shoko Company decided upon the firm name of Hua Hsin Company, in Shanghai, as such representative. Accordingly they sent to Takahashi & Co. in Seattle, a complicated cablegram reading:

> "Decided today name of firm is Hua Hsin Company, address 320 Szechuan Road, Shanghai. Confirm by telegraph in order to prevent any misunderstanding. Stop. Without knowing composition of tubes negotiations discontinued for the present. What shall we do. Must have immediate reply." (Plaintiff's Exhibit No. 3)

After a definite firm in Shanghai had been arranged as a Takahashi & Co. representative, Osawa suggested to Mikuni-Shoko Company "why not offer these tanks which we have as a starter for our connection in China" (R. 220). This was a natural suggestion but proved to have been an unfortunate one for appellants, because it apparently inspired in Mikuni-Shoko Company a desire to hook-in again on the tank deal, and caused them not only to inspire a

pretended order from Hua Hsin Company to the China Import & Export Company for the three tanks, but to write to Takahashi & Co., and to be received by them, some letters which, though unanswered, fell into the hands of the government, and resulted in this prosecution. More details of this later.

About July 16, Takahashi received from Hua Hsin Company in Shanghai by cablegram directed to China Import & Export Company an order for the purchase of these tanks. Takahashi had little faith in this order, but made and filed in Washington an application for permission to ship them to Hua Hsin Company at Shanghai. (This is the application complained about). The record does not furnish a copy of this order, for the original was attached to the application (as required by regulation), and forwarded to Washington, where it has ever since remained (R. 186). However, there is in the record a letter purporting to be a confirmation of this cablegram (Plaintiff's Exhibit No. 9; R. 290). Giving full credence to it as a confirmation, the cablegram probably contained the following data:

"E-Y.O.B.C.
11/2/41
ADR

"EXHIBIT 9

HUA HSIN COMPANY

Telephone: 15914

320 Szechuen Road.
Shanghai, July 4th, 1941

"Messrs. China Import & Export Company
212 5th Ave. So.
Seattle, Washington,
U. S. A.

"Gentlemen:

"As a consequence of our long business discussion with your representative, Mr. W. L. Chang, we wish to open our most cordial business relation with your goodselves by our placing an order with you for three new storage tanks, which we have heard that you have in your hands as available stock, and we beg to confirm our today's telegraphic order as follows, which we trust, could have been receiving your most careful attention at your end.

Article: New storage Tanks, capacity 80,000 Bbls. ea. Specifications and Blue-Prints as handed by Mr. Chang.

Quantity: 2 (three) complete sets with complete accessories and construction materials, such as welding rods and flux.

Price: CIF Shanghai U. S. $29,500—per complete set.

Amount: U. S. $88,500.—

Payment: Deduct U. S. $71,700 from our credit account. Balance shall be remitted shortly. All particulars as per Mr. Chang's letter.

Packing: Usual Export Custom.

Shipment: From Pacific Coast July/August 1941.

Destination: Shanghai, China.

"For your information, we might as well add here that these tanks are to be imported for the local storage purpose and will not be re-exported to any country with whom you are not on friendly terms.

"Thank you in anticipation for your kind at-

tention to the above, we beg to remain, Gentlemen,

Yours faithfully,
HUA HSIN COMPANY,
M. H. KIANGS
Manager."
(Ex. 9; R. 290)

While this letter of confirmation was never received by Takahashi (a circumstance to be more fully dwelt upon hereinafter), no doubt the data it contains, including the claimed credit of $71,700, was contained in the cablegram ordering the tanks.

Takahashi noted this claimed credit, and knew at the same time that the credit had been wiped out in the settlement with Mikuni-Shoko Company. Nevertheless, he forwarded the application to Washington in order to have on hand the permission to ship in case something should happen whereby he got paid for the tanks. He explains fully and positively:

"Now, then, at the time you made the application to Washington, D. C., for these tanks to be shipped by the China Import & Export Company, did you have any order for any money or any letter of credit from Hua Hsin Company?

"No sir, I did not. I did not need it.

"You were relying entirely, as a matter of fact, on the Mikuni-Shoko Company, weren't you?

"Well, we don't worry in our import-export business, Mr. Dennis, because if a person does not send a letter of credit, even at the last minute, you don't have to load the goods, and as long as we have the goods we are not worried at all about finances.

"So you had no letter of credit at all from Hua Hsin Company?

"That is correct.

"You were not relying on the Mikuni-Shoko Company?

"If arrangements had been agreed upon, I would have waited for a letter of credit to come from China. If there hadn't been any letter of credit I wouldn't ship even if the license had been granted. I was not relying in any way on Mikuni-Shoko Company for the funds for the proposition from China. I would rely on them in this sense that they would have to recommend to us some firm of reliable financial standing." (R. 199-200)

No order with cash or letter of credit ever came, and Takahashi began to look elsewhere for a sale of the tanks to save himself from a financial catastrophe. They were offered about to the American government, the British Buying Commission, Canadian government, parties in Mexico, and finally sold, in the United States, one to the Equipment Corporation of America, one to the Portland Gas & Coke Company and the third to the Shell Oil Company (R. 234).

After Osawa had adjusted the Takahashi business with Mikuni-Shoko Company and had closed the Takahashi office in Tokyo, he became marooned in Japan. He finished his business there two days after the last boat for Seattle had left in July. He took the next ship out, which landed him in Seattle on November 2 (R. 205). When the ship stopped at Victoria he wired Takahashi at Seattle to meet him upon arrival there with $200.00 for use in paying custom duties

(R. 215). Takahashi met him with the money and also with him some letters he had received from Mikuni-Shoko Company of a compromising nature, to which he had never replied and for which he wanted an explanation "at the very earliest possible moment" (R. 185). Osawa, in leaving the boat inadvertently dropped a letter in the waste paper basket in his stateroom, a letter indicating that he was not above smuggling into the country a few pairs (six to be exact) of silk stockings. This letter finding its way into the customs officials' hands resulted in both of them being searched at the dock. It was soon demonstrated that the stockings had been properly declared, but in making the search some embarrassing letters and documents upon both appellants were uncovered and seized.

As a petition to return these papers and to quash the indictment based thereon was subsequently made before trial by both appellants, considered and denied by the court, further details of this occurrence will be reserved until we come to consider the rulings of the court in that regard.

At the trial proper objections were interposed to the reception of these letters and documents in evidence, and exceptions taken to the court's ruling admitting same.

At the close of the government case, and again at the close of the entire case, a challenge to the sufficiency of the evidence to warrant submission of the case to the jury was interposed, overruled and exceptions preserved.

In the court's instructions to the jury the court

saw fit to comment upon some of the evidence, to which comment the appellants duly excepted. These comments require some six pages to set forth in the record, and a recitation of them will be postponed for printing in full until we come to treat of them as one of our assigned errors.

Each of appellants produced testimony of their good reputation in the community for uprightness of character and being law-abiding citizens, but the court in his instructions to the jury so commented thereon as to rob appellants of all value thereof, to which appellants duly excepted, and this instruction and comment, with exceptions, was preserved and will be later set forth in full.

The jury returned a verdict of guilty on all three counts, and after motions for new trial were interposed and denied, the court entered judgment and sentence, each appellant receiving sentence on the first count 2 years; second count 2 years; third count 5 years; the sentence on the last count to run concurrently with those on the first two.

Neither appellant is under commitment, but both are detained by the military authorities at a relocation camp near Twin Falls, Idaho.

STATEMENT OF POINTS RELIED UPON

Appellants duly filed an assignment of errors (R. 36), and gave notice that the following points would be relied upon on appeal (R. 421):

(1) Denial of the separate petitions of appellants for the return of private papers forcibly taken from their persons, in violation of their rights under the Fourth and Fifth Amendments to the Constitution of the United States.

(2) Denial of appellants' motion to quash indictment. This motion was predicated upon the ground that the private papers so taken from appellants had been submitted by the United States District Attorney to the grand jury and had become the basis for the indictment, without which the District Attorney could not successfully prosecute the same.

(3) Admission in evidence, over appellants' objections of private papers and letters forcibly taken from their persons. Appellants contend that the use of such evidence by the Government in connection with their prosecution violated their rights under the Fourth and Fifth Amendments to the Constitution of the United States.

(4) Denial of motions made by the appellants, and each of them, to dismiss the indictment at the end of the Government's case, on the ground that the evidence was insufficient, as a matter of law, to sustain any count of the indictment, and the denial of their separate motions made at the close of all the evidence to dismiss and for direction of verdicts of not guilty on each and every count of the indictment.

(5) The trial court's charge to the jury exceeded the bounds of fair comment and was highly prejudicial in that it was a biased, unfair and one-sided analysis of the evidence, and was argumentative.

(6) The instruction which the court gave the jury concerning the evidence of appellants' good character and reputation was contrary to law, because it failed to tell the jury that if this evidence raised a reasonable doubt in their minds as to appellants' guilt they are entitled to the benefit of that doubt and the jury's verdict should, therefore, be not guilty. On the contrary, the instruction which the court gave, by direct statement, innuendo and suggestion, made good reputation of doubtful value and probably a positive disadvantage to appellants.

ARGUMENT

ASSIGNMENTS OF ERROR I, II, III, IV and V.

I. The court erred in denying the petition of Charles T. Takahashi for the return of private papers forcibly taken from his person, in violation of his rights under the Fourth and Fifth Amendments to the Constitution of the United States (R. 36).

II. The court erred in denying the petition of Edward Y. Osawa for the return of private papers forcibly taken from his person, in violation of his rights under the Fourth and Fifth Amendments to the Constitution of the United States (R. 36-37).

III. The court erred in denying the motion of the

defendants Charles T. Takahashi and Edward Y. Osawa to quash the indictment herein (R. 37).

IV. The court erred in admitting in evidence the papers taken from the person of appellant Takahashi (R. 37).

V. The court erred in admitting in evidence the papers taken from the person of appellant Osawa and from his brief case (R. 37).

As these five assignments grow out of one state of fact it is desirable, if not necessary, to discuss them together, based upon the following record:

Atherton's affidavit (R. 58) says that he took from Osawa:

(1) A brief case containing various papers, including one letter from Hua Hsin Co., dated Shanghai, July 4, addressed to China Import & Export Company, 212 Fifth Avenue South, Seattle, and signed by M. H. Kiang, manager. That the letter contained a reference to the sum of $71,700, etc.

that he took from Takashashi:

(1) Telegram in code transmitted by Mikuni-Shoko Co. on or about June 27, 1941, at Tokyo, Japan, addressed to Takashashi & Co., Seattle.

(2) Letter dated July, 1941, addressed by Edward Y. Osawa at Tokyo, Japan, to C. T. Takahashi.

(3) Letter from Mikuni-Shoko Co. in confirmation of telegram addressed NEWYR.

(4) Letter written by Edward Y. Osawa, dated July 15, 1941, at Tokyo, Japan, and sent to Charles T. Takahashi.

(5) Letter dated July 16, 1941, written by M. Ikuto, Tokyo, Japan, to C. T. Takahashi & Co.

(6) Letter dated July 12, 1941, written by Edward Y. Osawa, Tokyo, Japan, and addressed to C. T. Takahashi, together with other papers. (R. 61-62)

Richards' affidavit (R. 68) says that he took from Osawa:

(1) The same brief case, including the same letter, and that he took from Takahashi the same six items described by Atherton, and also adds, as Atherton did, together with other papers (R. 67-69).

The indictment recites all these seven items as overt acts. In addition it recites some fifteen other acts, most of which is made up of the sending and receiving various letters and telegrams, and we believe it is fair to presume that many of these items are covered by the "together with other papers" recited in both affidavits. No harm could possibly be done by so doing, for we read later in the evidence of Richards at the trial:

> "Exhibits No. 11, No. 12, No. 13, No. 14, No. 15, No. 16, No. 17 and No. 18 are papers I took from Mr. Takahashi's pocket on November 2 on the pier." (R. 136)

(See also Atherton's affidavit, R. 161-162).

It is probably sufficient to make one definite instance of a proper record on the trial:

> "MR. DENNIS: I offer these exhibits No. 10, No. 11, No. 12, No. 13, No. 14, No. 15, No. 16, No. 17 and No. 18.
>
> MR. CRANDELL: To which the defendant C. T. Takahashi makes the basic objection.
>
> MR. GRIFFIN: To which the defendant Osawa makes the basic objection.

THE COURT: No. 14, No. 15 and No. 16 * * * are admitted and the objections of Mr. Osawa are overruled. The objection of Mr. Takahashi is overruled.

MR. GRIFFIN: Exception.

MR. CRANDELL: Exception (R. 137-138)

THE COURT: The other exhibits, No. 10, No. 11, No. 12, No. 13, No. 17 and No. 18 are admitted in evidence. The objection of Mr. Takahashi is overruled.

MR. CRANDELL: Exception.

THE COURT: The objections of Mr. Osawa are overruled. The exception to each defendant and to each ruling as to each exhibit are allowed. I think I have covered all the offers. So there will be no question, Exhibits No. 10 to No. 18 inclusive are admitted in evidence and the objections are overruled and the exceptions allowed." (R. 137-138).

Exhibit 9, taken from Osawa's brief case, offered in evidence (R. 161):

"To which defendant Osawa objects upon the basic objection heretofore made." (R. 161)

Ruling reserved (R. 161).

Again offered, same objection, and admitted (R. 215-216).

The record discloses that after the indictment was returned and before trial the appellant Takahashi filed in the cause his petition for the return of certain papers allegedly seized by Federal officers in violation of his rights under the Fourth and Fifth Amendments to the Federal Constitution. At the same time appellant Osawa filed a similar petition for the return of other papers taken from him at the

same time, in violation of his constitutional rights. And both appellants joined in a motion to quash the indictment herein because all said papers had been submitted to the grand jury and had become the basis of said indictment.

The government in opposing both petitions and the motion filed some seven or eight affidavits of Federal agents setting forth their doings in the premises at the time of the search, deemed by the government to show justification for the seizures.

A hearing was had upon the issues thus made, and the court denied both petitions and overruled the motion, to which rulings of the court the appellants excepted and their exceptions were allowed.

From the showing made by appellants and the counter-showing of the government the following facts appear, undisputed:

Appellant Charles T. Takahashi is the sole member and owner of the firm of C. T. Takahashi & Co., importers and exporters, Seattle, Washington. Appellant Edward Y. Osawa is his general manager. In the spring of 1941 Takahashi sent Osawa to Tokyo, Japan, upon an errand for the firm. Osawa returned on the boat HIKAWA MARU, which landed in Seattle on the morning of the following November 2.

On this return trip Osawa wired Takahashi from Victoria to meet him at the boat in Seattle with $200.00, wanted to pay custom duties, if any required, and Takahashi was at the dock when he arrived.

Upon debarking, Osawa in common with the other

passengers was herded by the Custom officials into the enclosure set apart for incoming passengers preparatory to clearing their baggage from customs duties; and Takahashi "tagged" along into the enclosure.

While the routine business of clearing the passengers' baggage was going on in the enclosure government agents were busy elsewhere. One J. W. Stanton, an inspector in the Bureau of Entimology and Plant Quarantine, pursuant to his duties was searching state-rooms on the HIKAWA MARU for plants, fruits and insect life, and in a waste paper basket in the state-room recently vacated by Osawa he found a letter in an opened envelope, which upon reading incited a suspicion in his mind that some six pairs of silk stockings might be in process of being smuggled into the country by Osawa. A photostat of this letter was attached to his affidavit filed as a part of the counter-showing, marked "Exhibit A," and as it appears some five times in the counter-showing we reproduce it in the Transcript of Record, once for all, at page 64.

In line of duty Stanton delivered this letter to Customs Inspector A. J. Frankel (R. 70). Mr. Frankel turned it over to Chief Inspector of Customs A. H. Koons (R. 72). Mr. Koons gave it to Customs Agent A. D. Richards (R. 74). Mr. Richards then showed it to Customs Agent A. S. Atherton (R. 60), and the two together, Richards and Atherton went hunting for Osawa. They soon spotted him and Takahashi. The two were going about in the passengers' enclosure, frequently consulting, and passing a paper

between them, state their affidavits. (It subsequently developed that Osawa had brought with him some seven pieces of baggage, of which two were not visible and for which they were hunting, and the "paper" (reproduced at R. 81-87) was his copy of the Baggage Declaration and Entry, being used by the two in the search for the missing pieces). Everything being finally settled to their satisfaction Osawa and Takahashi started to leave the enclosure, when they were intercepted by officers Atherton and Richards, who required both of them to accompany them to the waiting room for search (R. 67).

From the waiting room they took Osawa alone into the washroom adjoining and searched him. They found no stockings or other smuggled merchandise, but they found upon his person a certain letter and in his brief case "various papers," which they seized and carried away with them (R. 67).

Having finished with Osawa, they then took Takahashi to the washroom and searched him. They found no stockings or other smuggled goods, but in his pockets they found an assortment of papers, some six of which are listed in their affidavits, and which they seized and carried away with them.

So far as the silk stockings are concerned, Osawa's declaration showed that the six pair referred to in the letter had been properly declared, and the government has long since ceased to talk about them.

From the foregoing recitation of facts, which are undisputed, let it be noted that, (a) no arrest was made; (b) no search warrant was possessed by the

officers; (c) no crime was being committed; (d) no proceedings against appellants were pending; (e) the papers seized had no connection with the purpose of the search; and (f) appellants were not even suspected of the crime or crimes with which they were later charged.

The siezure of any papers, under such circumstances, as evidence of some crime disconnected with the object of the search, and the subsequent use of such papers as evidence against the owners, is clearly an unreasonable search and seizure, and violates the owners' constitutional rights under the Fourth and Fifth Amendments to the Constitution of the United States.

Entick v. Carrington, 19 Howard St. Tr. 1029;
Boyd v. U. S., 116 U.S. 616, 6 S. Ct. 524, 29 L. ed. 746;
Weeks v. U. S., 232 U.S. 383, 34 S. Ct. 341, 58 L. ed. 652;
Gouled v. U. S., 255 U.S. 298, 41 S. Ct. 216, 65 L. ed. 647;
Byars v. U. S., 273 U.S. 28, 47 S. Ct. 248, 71 L. ed. 520;
Go-Bart Imp. Co. v. U. S., 282 U.S. 344, 51 S. Ct. 153, 75 L. ed. 374;
U. S. v. Lefkowitz, 285 U.S., 452, 52 S. Ct. 420.

This principle has been enunciated so many times that it has become practically axiomatic, and it is nothing short of amazing that the government at this late day should take some odds and ends of papers thus seized, and with the use of leads thus obtained piece them in with other papers and records later

found at the Takahashi office, and then submit the "case" to the Grand Jury as the basis of an indictment!

Counsel for the government attempt to justify the legality of this search and seizure upon the ground that Osawa, being an incoming passenger from a foreign port was subject to search for dutiable goods without a search warrant; and that Takahashi, having followed Osawa into the passengers' enclosure, rendered himself amenable to the same right of search; and that having the right of search, the officers had the right to seize any evidence they found which they deemed pointed to crime, any crime, whether the crime pointed at was the crime actuating the search, or some other crime.

To make the issue clear, let it be said appellants do not question the right of the Customs officers on this occasion to search either or both Osawa or Takahashi, so long as the search was directed at uncovering smuggled goods. But we do maintain that though the officers had the right to search for smuggled goods, they were limited in their search *to* smuggled goods, and that this right of search ended when their search for smuggled goods ended; that if their search uncovered evidence of matters unrelated to smuggled goods it was unlawful for them to seize such evidence, just as it would have been unlawful had they possessed a valid search warrant and had gone beyond the directions of the warrant and seized property not covered thereby.

Let it be kept in mind that there is no such thing known to Anglo-American law as a valid search, at

any time, or at any place, or under any circumstances, for papers to be used as evidence against an accused. Even a search warrant, issued with all the formalities of law, will not avail for *that* purpose.

Entick v. Carrington, 19 Howard St. Tr. 1029.

This is the famous case which has become a part of the unwritten constitution of England and from which stems the Fourth Amendment to our Constitution and all our search and seizure law, and in which Lord Camden said:

> "Lastly, it is urged as an argument of utility, that such a search" (general warrants for search and seizure of papers for evidence) "is a means of detecting offenders by discovering evidence. I wish some cases had been shown, where the law forceth evidence out of the owner's custody by process. There is no process against papers in civil causes. It has been often tried but never prevailed. Nay, where the adversary has by force or fraud got possession of your own proper evidence, there is no way to get it back but by action. In the criminal law such a proceeding was never heard of; and yet there are some crimes, such, for instance as murder, rape, robbery and house breaking, to say nothing of forgery and perjury, that are more atrocious than libeling." (the cause of action pending). "But our law has provided no paper search in these cases to help forward the conviction. Whether this proceedeth from the gentleness of the law towards criminals, or from a consideration that such a power would be more pernicious to the innocent than useful to the public, I will not say. It is very certain that the law obligeth no man to accuse himself; because the necessary means of compelling self accusa-

> tion, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it would seem that search for evidence is disallowed upon the same principle. Then, too, the innocent would be confounded with the guilty."

After a few further observations, his Lordship concluded:

> "I have now taken notice of everything that has been urged upon the present point; and upon the whole we are all of the opinion that the warrant to seize and carry away the party's papers in the case of a seditious libel is illegal and void."

This quotation is taken from the case of *Boyd v. U. S.*, 116 U.S. 616, 629, 6 S. Ct. 524, 531, 29 L. ed. 746, 750, itself a celebrated case, much quoted, where the Supreme Court says the Fourth Amendment was framed with the *Entick* case in mind, and which was "considered as sufficiently explanatory of what was meant by unreasonable searches and seizures." See also *Weeks v. U. S.*, 232 U.S. 383, 34 S. Ct. 341, 58 L. ed. 653.

> "* * * They (search warrants) may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding * * *" (citing the *Boyd* case, above).
>
> *Gouled v. U. S.*, 255 U.S. 298, 41 S. Ct. 261, 65 L. ed. 647, 652.

> "Respondents' papers were wanted by the officers solely for uses as evidence of crime of which respondents were accused or suspected. They could not lawfully be searched for and taken even under a search warrant issued upon

ample evidence and precisely describing such things and disclosing exactly where they were. *Gouled v. U. S.*, 255 U.S. 298, 41 Sup. Ct. 261, 65 L. ed. 647."

U. S. v. Lefkowitz, 285 U.S. 452, 52 S. Ct. 420, 76 L. ed. 877.

"It is not every kind of property that may be seized under a search warrant. It is intended that the warrant be issued with the privilege to seize such property as was used as the means of committing a felony. All papers and documents which afford evidence that a felony has been committed but which were not the means of committing it, are immune from seizure. *Veeder v. U. S.*, 252 Fed. 414, 164 C.C.A. 338."

In Re No. 191 Front Street (C.C.A. 2) 5 F.(2d) 282.

"The requirement that warrants particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken nothing is left to the discretion of the officer executing the warrant."

Marron v. U. S., 275 U.S. 192, 48 S. Ct. 74, 72 L. ed. 231.

If this last were not true the Fourth Amendment would become a nullity. All that would be necessary in the future for a general search would be a stock form of affidavit relative to, say mail robbery, and a search warrant based thereon to be used on all occasions. The search of course would disclose nothing pertaining to mail robbery; but in rummaging about among the victim's effects evidence might be un-

covered relative to a violation of the Mann Act. If such evidence can then become the basis of an indictment, it is folly to decry longer against the evils of general searches, at which the Fourth Amendment was aimed.

It is clear then that had the Customs officers possessed a search warrant for silk stockings, they could not in the execution of it have seized what they did seize. Were their rights greater without one?

We doubt if counsel for respondent will challenge anything we have said thus far. If they pursue the same course here that they did in the lower court they will base the actions of the Customs officials upon other considerations than the whereabouts of six pair of silk stockings. The showing made in the affidavits of Customs Officers Atherton and Richards furnishes the key.

It is alleged in the affidavit of Mr. Atherton that about October 15, 1941 (18 days before the search), he, as a United States *Customs Agent*, received instructions from the Bureau of Customs to investigate appellant C. T. Takahashi as a suspected violator of the *Foreign Funds Control Act;* and that he had commenced this investigation the latter part of that month; that he was at the dock when the HIKAWA MARU arrived (he doesn't say whether as a Customs Agent, or as the guardian of the Foreign Funds Control Act); that he saw Osawa and Takahashi there; that he didn't know either, but they were pointed out to him by another officer, who volunteered their names and that one was manager for the other; that both were in the passengers' enclosure, and that he (wit-

ness) knew Takahashi did not belong there; that he saw Osawa with a paper in his hand; that he (witness) had been shown the letter, Exhibit A, and that the contents of that letter, plus the close contact of Osawa and Takahashi, plus the fact that Takahashi did not belong in the enclosure, led to the belief in the mind of the witness that "a plan was afoot in his presence to violate the laws of the United States, and that Takahashi was as liable to suspicion as Osawa;" (he does not indicate what law, whether the Customs laws or the Foreign Funds Control Act); that he and Customs Officer Richards detained both men as they were leaving the enclosure, and after exhibiting the badge of a *Customs Agent* directed them to enter the adjoining waiting room for search; from the waiting room they took first Osawa into the washroom and searched him; that in this search they discovered a letter (describing it) which they took and held "as an instrumentality of the crime of violating the Foreign Funds Control Act;" and that they seized other papers "as bearing on and contributing to the transaction described in the letter;" that they searched Takahashi and seized from his person a further lot of papers, some six of which are described in the witness' affidavit.

From the affidavit of Mr. Richards we learn that he, too, though a Customs Agent, had received instructions about October 15, 1941, from the Bureau of Customs to investigate Takahashi as a suspected violator of the *Foreign Funds Control Act*, and had commenced this investigation the latter part of that month. His affidavit then follows the affidavit of Mr.

Atherton *verbatim*. He saw the same acts, was moved by the same thoughts, drew the same conclusions, had the same belief that a plan was afoot in his presence to violate the laws of the United States, and finally seized the same letter "as an instrumentality of crime," and the other papers "as bearing on and contributing to the same transaction."

There we have the key. The search is to be justified upon a state of crime being committed in the presence of the officer, and the paper seized is to become, not *evidence* of crime, but an *instrumentality* of crime; thus bringing, or attempting to bring, the case within the purview of cases of that character.

Then let's analyze this showing a little more closely, to learn what kind of a search it was, for, as said by Mr. Justice Bradley in the *Boyd* case, "the search for and seizure of stolen or forfeited goods, or *goods liable to duties and concealed to avoid the payment thereof*, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. In the one case the government is entitled to the possession of the property; in the other it is not." (*Boyd v. U. S.*, 116 U.S. 616, 623, 6 S. Ct. 524, 528, 29 L. ed. 746, 748). If it was a search for "goods liable to duties and concealed to avoid payment thereof" (whether silk stockings or any other merchandise), we have already conceded the right of search on this occasion, of both men, contending only that the right is limited to a search for smuggled goods, and ends when the search for smuggled goods ends. So let's see whether

it was anything more than a search for "goods liable to duties and concealed to avoid the payment thereof."

The showing itself has a peculiar ring to it. We have no evidence that either officer did *not* have instructions to investigate Takahashi as a violator of the Foreign Fund Control Act, as they testified they had, but it comes as a surprise to us to learn that that Act comes within the domain of the Customs Department. The officers were at the dock that morning, but they were not there with Osawa or Takahashi in mind, as violators of the Foreign Fund Control Act or any other Act, for they knew neither of them. The officers may have had a double side to their character that morning, but it was the Customs side that the silk stockings appealed to and moved them into action. If they got a belief in their mind that "a plan was afoot in their presence to violate the laws of the United States," as they say they did, it was the Customs laws and was engendered by Exhibit A, for they had not yet seen the papers that they later seized. Exhibit A was the only paper they had seen before the search which uncovered the papers seized. In fact, they tell us it was the badge of a *Customs Officer* which they exhibited to the two men as their authority in directing them into the waiting room for search. Then why pretend that they were acting as anything but Customs men and that the search was anything but a search for smuggled goods?

Even government counsel was not impressed with the showing of these two officers, for when he came to study his case he concluded that it was not the *Foreign Funds Control Act* at all which was being violated,

and which had so strongly moved the Customs officers, but a Presidential order promulgated pursuant to Sec. 99 of Title 50 U.S.C.A., instead! (See indictment).

When the Customs officers found the silk stockings properly declared that should have ended the matter. Going farther was going beyond the law, and what was uncovered avails nothing as evidence.

> "Nor is it material that the search was successful in revealing evidence of a violation of a Federal statute. A search prosecuted in violation of the Constitution is not made lawful by what is brings to light; and the doctrine has never been recognized by this court, nor can it be tolerated under our constitutional system, that evidences of crime discovered by a Federal Officer in making a search without lawful warrant may be used against the victim of the unlawful search where a timely challenge has been interposed. (Citing 5 previous cases among Supreme Court decisions)."
>
> *Byars v. U. S.*, 273 U.S. 28, 47 S. Ct. 248, 71 L. ed. 520.

It was clearly an unreasonable search and seizure. and comes within the inhibitions of the Fourth Amendment.

The petitions, both of them, should have been granted. But though denied, the motion to quash the indictment because the evidence so acquired was laid before the Grand Jury in violation of appellants' rights under the Fifth Amendment, should have been sustained. That the evidence was so used is shown conclusively by comparing the list of papers, recited in the affidavits of both Atherton and Richards, with

the overt acts alleged in the indictment. They are identical.

And if what we have said so far holds good, then the rights of appellants were further infringed by the use of the tainted evidence upon the trial, over proper objections and exceptions reserved.

It is well settled that, when properly invoked, the Fifth Amendment protects every person from incrimination by the use of evidence obtained through search or seizure made in violation of his rights under the Fourth Amendment. *Boyd v. United States, supra* (116 U.S. 616), 630, *et seq.; Weeks v. United States, supra* (232 U.S. 383), 398; *Silverthorne Lumber Co. v. United States, supra* (251 U.S. 385), 391, 392; *Gouled v. United States, supra* (255 U.S. 298), 306; *Amos v. United States,* 255 U.S. 313, 316.

ASSIGNMENTS OF ERROR VI and VII.

VI. The court erred in denying the motion made on behalf of the defendants, and each of them, to dismiss the indictment at the end of the Government's case, on the ground that the evidence was insufficient, as a matter of law, to sustain any count in the indictment (R. 37).

VII. The court erred in denying the motion made by the defendants, and each of them, at the close of all the evidence to dismiss the indictment and for a direction of verdict of not guilty on each and every count of the indictment (R. 38).

Let us keep well in mind the issues in this case.

The gist of the charges in all the counts was the filing in Washington of the application for permission

to ship the three tanks (Government's Exhibit No. 9), in which application it was stated the destination of the tanks was China, whereas it is alleged in all three counts of the indictment the ultimate destination was Japan; which, if true, was a violation of Section 6 of the Presidential order heretofore printed in full; and was also a violation of Section 80, Title 18, U.S.C.A., pertaining to the making of untrue statements in any matter pending before a department in Washington.

Count 1 of the indictment charges all five defendants with a conspiracy to file this application;

Count 2 charges that the filing violated this Presidential order;

Count 3 charges that the same act of filing was also a violation of Section 80, Title 18, U.S.C.A.

And to appreciate the argument to follow, the court must fully understand that Takahashi & Company and the other Takahashi company, "China Import & Export Company," once closed their relations with Mikuni-Shoko Company. When they repaid to them the moneys received as advance payment on the tanks, and the freight too, and closed the Takahashi office in Tokyo they were through not only with Mikuni-Shoko Company but with Japan as well, though Osawa was marooned there for want of a boat to get away. And, by the same token, Mikuni-Shoko Company was shorn of all interest in the tanks which now belonged to Takahashi & Company and were subsequently sold by them in this country.

But after once closing out their interest in the matter Mikuni-Shoko Company attempted to back in

again, and it is matters which occurred subsequent to the final settlement that furnishes the Government with cause to think that the tanks were destined to Japan and with an opportunity to flaunt in our faces and in the faces of the court some three letters which, indeed, tend to so indicate and which are unquestionably compromising of appellants if they are to be given face value. But appellants claim they are not what they appear to be on their face and are not binding upon them, and in any event that they have no effect whatever upon the issues because they had, and could have had, no influence upon the filing of the application.

After Mikuni-Shoko Company had provided the Takahashi representative in Shanghai, and Osawa had made the unhappy suggestion, "Why not offer these tanks which we have as a starter for our connection in Shanghai," Mikuni-Shoko Company apparently had an afterthought. At any rate they soon proposed to Osawa to establish a new credit upon the tanks. They wanted to trade back yen for dollars and with the proceeds grant a new credit. Osawa tells of this in one of his letters and also so testified on the witness stand but says "I would not stand for that" (R. 216-217).

Notwithstanding this rebuff, along came the cablegram from Hua Hsin Company in Shanghai ordering the tanks to be shipped to them. It is perfectly apparent the order was inspired by Mikuni-Shoko Company. The data it contained could have been supplied by no one else. It is equally apparent that Hua Hsin Company bound themselves in no manner by the order.

If accepted by Takahashi at all it would have to be accepted in toto and there stood a claimed credit of $71,700.00. Paraphrasing the order read, "Ship us our tanks for which you have already been paid." Under these circumstances Hua Hsin Company were bound to nothing and could only be serving Mikuni-Shoko Company.

Takahashi saw all this to be sure and in the face of it filed the application. He had the tanks on his hands and was hopeful of selling them and made the filing in order to have on hand the permission to ship in case payment for them should materialize.

This act of filing constitutes a completion of the crime in all three counts—if any at all were committed—and makes anything occurring subsequently wholly immaterial to the issues.

Now let us consider the letters. The first one purports to be a confirmation of the cablegram ordering the tanks, with some additions. It is dated July 4. It is signed Hua Hsin Company by M. H. Kiang, one of the defendants, and is addressed to China Import & Export Company at Seattle, but it was never mailed to them or received by them. Osawa explained its existence in this wise: It was handed to him in Tokyo by Mikuni-Shoko Company, who apparently had gotten it from Hua Hsin Company in Shanghai. Noting the credit claimed in it, Osawa protested that all such credit had been wiped out, whereupon Mikuni-Shoko Company said that "they would get him a new contract." The letter then being so void of effect, Osawa did not bother to send it to Takahashi, but filed it away in his brief case. It remained there un-

til his arrival on the dock in Seattle several months later when Customs officers discovered it there and seized it while searching for silk stockings. Both Customs agents, Richards and Atherton, in their affidavits resisting the petition to return it to Osawa admitted it was so found. Indeed it was this very letter that inspired them with the thought that "a crime was being committed in their presence." And the Government pleads it in the indictment overt act No. 20 as a letter Osawa had in his possession on November 2 (the day of the search).

If all this is true it could have had no influence upon Takahashi when he filed the application three months before.

Next come the two letters, Exhibits 17 and 18.

They are long and will not be quoted here. On their face, they are compromising in the extreme, and were sufficient to carry the case to the jury if we can not dispose of them here as we have with Exhibit 9.

Osawa never saw the letters until a day or two before the first trial (R. 220). They had been written by Mikuni-Shoko Company and mailed over his head to Takahashi & Company in Seattle.

They are dated July 16, and received by Takahashi some time in August. July 16 is the date of the application filed in Washington. They could not, therefore, have reached Takahashi in time to influence him in any manner in filing the application, and whatever else we may think of them they were irrelevant to the issues.

That is all that need be said of them. Nevertheless,

we would like to record that Takahashi says he never answered the letters. He didn't understand them and that is the reason he had them on his person when he went to the dock to meet Osawa. He testified:

> "A I wanted to discuss them with Mr. Osawa at the very earliest possible moment. The interpretation that I made of it here was absolutely contrary to the policy of my firm. I had not answered the letters up to that time and never have answered them and have never since had any correspondence with the Tokyo company." (R. 185)

With the evidence showing this state of facts where was a case to go to the jury? Where was any conspiracy? Who agreed with whom? Where was the meeting of minds? What was the end to be accomplished by two or more acting in concert?

The Government had no evidence of its own to offer. It was dependent entirely upon such papers as they took upon the search and seizure and those subsequently furnished them voluntarily by appellants, to which they added such conclusions as best fitted their desire to injure a couple of Japanese they arrested the day after Pearl Harbor (R. 213).

Had the defendants in the Orient been on trial we would not contend that the case should not have gone to the jury as to them. The appellants never met any of Hua Hsin Company and never had any communication with any of them other than receiving the order for the tanks. But we feel as between them, Mikuni-Shoko Company and Hua Hsin Company, there were some machinations going on behind the

backs of appellants which could not stand up under fire, even though we do not know what the arrangements were. It is enough to say that appellants were not drawn into them.

Could we have impressed upon the trial court our desire that the issues, as we understand them, be kept fully in mind, we think this case would not be troubling this court now. But, we feel, he was too much preoccupied with what he considered was the honesty or dishonesty of these letters and anyone whose name appeared therein. This thought will be developed more fully when we come to consider our exceptions to his comments upon the evidence before the jury and what we say there might well be considered by this court as addenda here.

ASSIGNMENT OF ERROR VIII.

VIII. The court erred in instructing the jury, because the charge exceeded the bounds of fair comment and was highly prejudicial in that it was a biased, unfair and one-sided analysis of the evidence, and was argumentative (R. 38-46).

This assignment is printed in full in the Appendix pursuant to Rule 24 (following page 50 hereof).

Because of the length of these comments, fraught as they are with so many temptations to argue the accuracy of the facts touched upon by the court, it is not feasible to point out in detail each and every objection to it. Some general observations will have to suffice.

In the first place, it is not clear what the learned court had in mind was the issue in this case when he was thus speaking. The dominant thought through-

out the remarks seems to be the "honesty" of someone or some thing; "honestly believed"; "honest order"; "honest letter"; "honest sale"; "honest transaction." Whereas, the issue in the case, in each and every count in the indictment, was whether, when Takahashi filed the application with the State Department for permission to ship the tanks to China, he intended to tranship them to Japan; or, that *he knew* that some one else with power so to do *intended to do so.* To decide that issue it was wholly unnecessary to insert another one about the honesty of any one or any thing. And it was particularly grevious to the appellants in this case to have to defend not alone their own honesty but the honesty of some one across the Pacific who they themselves felt had not been playing open and above board with appellants.

We do not deny the right of the court to comment upon the evidence, to sum it up, even to express his opinion upon the case, provided he makes it clear to the jury that after all they are the judges of the facts. But we do maintain that, if he ventures into the field at all, he must be fair and impartial; that if he states one side he must state the other; that he must not be argumentative; and that he must not become an advocate.

Says the Supreme Court of the United States:

> "In a trial by jury in a Federal court the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law."

And in the course of discussing the function of the

trial judge at common law it quoted Sir Mathew Hale as follows:

> "Herein he is able, in matters of law emerging upon the evidence, to direct them; and also, in matters of fact to give them a great light and assistance by his weighing the evidence before them and *observing where the question and knot of the business lies*, and by showing them his opinion even in matters of fact; which is a great advantage and light to laymen." (Italics supplied)

But, continues the court:

> "This privilege of the judge to comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judical, to be exercised in conformity with the standards governing the judicial office. In commenting upon testimony he may not assume the role of a witness. He may analyze and dissect the evidence, but he may not either distort it or add to it. His privilege of comment in order to give appropriate assistance to the jury is too important to be left without safeguards against abuses. The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling'."
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> *Quercia v. U. S.*, 289 U.S. 466, 698 S. Ct. 698, 77 L. ed. 1321.

Says the Circuit Court of Appeals for the Tenth Circuit, upon the subject under discussion:

> "But in summing up and commenting on the evidence, the trial judge should be governed by certain well recognized limitations inherent in the very nature of the judicial office. He should

state the evidence fairly and accurately, *both that which is favorable and that which is unfavorable to the accused. His statements should not be argumentative, but impartial, dispassionate, and judicial;* and they should be so carefully guarded that the jurors are left free to exercise their independent judgment upon the facts." (Italics ours)

Minner v. U. S., 57 F.(2d) 506, 513.

The Circuit Court of Appeals for the Eighth Circuit comments on the same subject thus:

"In a criminal case in a Federal court, the trial judge has the power to superintend and direct the trial, to review the evidence, and to advise on the facts, but this power must not be abused. If the testimony is summed up or analyzed, care must be taken to sum up and analyze both sides, and the judge must not become an advocate."

Boatright v. U. S., 105 F.(2d) 737, 739.

And again:

"While the judge in the federal courts 'may comment on the evidence and may express his opinion on the facts, provided he clearly leaves to the jury the decision of fact questions' (*Weare v. United States*, 1 F.(2d) 617 (C.C.A. 8) and cases cited), yet, as was said in the same case, 'the instructions, however, should not be argumentative. The court cannot direct a verdict of guilty in criminal cases, even if the facts are undisputed. *Dillon v. United States* (C.C.A.) 279 Fed. 639. It should not be permitted to do indirectly what it can not do directly, and by its instructions to in effect argue the jury into a verdict of guilty.' See, also *Parker v. United*

States, 2 F.(2d) 710; *Cook v. United States* (C.C.A. 8) 18 F.(2d) 50."

Sunderland v. United States, 19 F.(2d) 202, 216.

There are other Federal cases to the same effect, and the three cited name some of them. But it is not necessary to go afield for our authority. This court is in line with the cases cited. See:

Pincolini v. U. S., 295 Fed. 468;
Carney v. U. S., 295 Fed. 606;
Williams v. U. S., 93 F.(2d) 685.

In the *Williams* case the exception to the charge was, that the court "erred in commenting upon the evidence * * * in that the comments amounted to an act of advocacy on the part of the court in favor of the prosecution, and in the said comments none of the evidence favorable to the defendants was stated;" which exception drew forth from this court a discussion that is decisive of the case here. Among other things this court said:

> "A federal judge need not summarize the evidence at all. But if he undertakes to do so, the summary must be fair and adequate. The authorities are agreed that it must not be one-sided."

But the remarks complained about can not be termed a "summing up." An "argument" best describes them; an argument, too, *for conviction*. This is shown the more clearly when we consider the last instruction of the court which preceded the matter complained of. He said:

> "You are not bound or controlled at all by any

> bold statement any witness may make. And you are not bound or controlled at all by any bold statement any defendant may have made. * * * And if any witness, whether defendant or not, makes any statement which you find to be unreasonable in the light of the testimony and in the light of the reasonable inferences to be drawn from the testimony, then you may disregard such statements, *even though there is no other witness who is able to testify to the contrary.*" (R. 271)

This instruction was but introductory to the remarks complained about. And the "bold statements" referred no doubt to the evidence given by the appellants, who had denied categorically that when the tanks were incorporated in the application for permission to ship to China they were in fact destined for Japan. They could have referred to nothing else, and the court by this instruction, followed by his argument — or comment, if you please — not only stripped the appellants of their defense, but even of their right to have it considered.

This was prejudicial in the extreme.

ASSIGNMENT OF ERROR IX.

IX. The court erred in instructing the jury upon the question of good reputation, evidence of which had been introduced upon the trial (R. 46-48).

This assignment is printed in full in the Appendix hereto, page 9A, pursuant to Rule 24.

As the court did not give the second instruction *in lieu* of the first, but distinctly said it was "*in addition* to what I have said," we have two instructions upon the same subject, and it is necessary to

consider them both. But first let us see what the true rule is as to the significance of that kind of evidence and the weight to be given it by the jury. A reference to an exhaustive note in 10 A.L.R., commencing at page 8 and continuing for more than 100 pages, indicates that while "good reputation" has always been considered competent evidence, what the probative effect thereof is has brought forth a considerable diversity of thought among the courts. However, it is believed that of late this thought has fairly crystalized, and may now be presented by reference to a limited number of cases. We start, as the modern cases do, with a decision from the Supreme Court of the United States:

> "It is impossible, we think, to read the charge without preceiving that the leading thought in the mind of the learned judge was that evidence of good character could only be considered if the rest of the evidence created a doubt of defendant's guilt. * * * Whatever may have been said in some of the earlier cases, to the effect that evidence of the good character of the defendant is not to be considered unless the other evidence leaves the mind in doubt, the decided weight of authority now is that good character, when considered in connection with the other evidence in the case, may generate a reasonable doubt. The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although without it the other evidence would be convincing."
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> *Edington v. U. S.*, 164 U.S. 361, 17 S. Ct. 72, 41 L. ed. 467.

The Circuit Court of Appeals for the Eighth Circuit has had the question before it in a couple of comparatively recent cases:

> "Where evidence of defendant's good character is introduced on defendant's behalf, he is entitled, especially if request is made, to instruction that purpose and function of such evidence is to generate a reasonable doubt of defendant's guilt, regardless of whether other evidence in the case be clear or doubtful, and that, if reasonable doubt is created thereby, when considered with other evidence, he is entitled to acquittal." Syllabus from
>
> *Sunderland v. U. S.*, 19 F.(2d) 203.
>
> "The rule was and is that, where evidence of good character is introduced in behalf of a defendant, he is entitled, and especially when a request is made, to an instruction to the effect (1) that the purpose and function of such evidence is to raise a reasonable doubt; (2) that it is entitled to be considered whether the effect of the other evidence in the case is clear or doubtful; and (3) that when it is considered with the other evidence, if a reasonable doubt is created as to the defendant's guilt, he is entitled to be acquitted."
>
> *Salinger v. U. S.*, 23 F.(2d) 48, at 53.

The Circuit Court of Appeals for the Second Circuit, after exhaustive search for the true rule in each Circuit, has this to say:

> "We understand the rule to be that the jury are to consider all the evidence in the case, including that of good character, and when so considered the evidence of good character may be sufficient to give rise to a reasonable doubt

> justifying a verdict of acquittal, when without it the other evidence in the case would be convincing of defendant's guilt. This is not only the rule in this Circuit, but also in the Third, Fifth, Eighth, and *Ninth* Circuits. In the Sixth and Seventh Circuits and in the District of Columbia a contrary view is taken."
>
> *Kreiner v. U. S.*, 11 F.(2d) 722, 726.

Though that Court commits this Court, among other Circuits, as to the rule established, and reviews some twelve or fifteen cases, we frankly state we have been unable to put our hands upon the case from this court which that court relied upon as its authority. However, this court had the same question before it in a case decided some time *after* the *Kreiner case* (*Baugh v. U. S.*, 27 F.(2d) 257), and while not so exhaustive in its treatment of the question as some of the other circuits it cites the *Kreiner case* as an authority for its own views, which puts the two circuits in harmony, and makes the quotation from the *Kreiner* case binding upon this court upon the point under discussion, if it was not before.

For a recent and able discussion of the cases since *Edington v. U. S.*, with an analysis and citation of numerous Circuit Courts of Appeals cases (including *Baugh v. U. S.* by this court), see *U. S. v. Dewinsky*, 41 F. Supp. 149 (Judge Goodrich, District Court, District of New Jersey).

Now let us look at the trial court's instructions in the light of the true rule thus found. First, as to the instruction given before exceptions taken.

It is to be first noted that the court, while recognizing evidence of good character to be competent evi-

dence, and telling the jury they were "to give it that weight as you believe it entitled to receive," it failed to enlighten them as to the office and probative value of such evidence; in other words, it failed to furnish the jury with any legal scales with which to weigh it. Stated as the court stated it, and without such scales, left the jury the judges of the law, instead of the court; and if they were to give the evidence "such weight as they believed it entitled to receive," without further guide, the jury may well have thought they were permitted to ignore it entirely.

Then, after treating the evidence in such casual manner, the court went on to say, "But the jury will recognize" that many men have been convicted of crime who previously had borne good reputations. Preceded as it was by the word "but," a sign of subtraction from or limitation of a previous statement, this injunction robbed the evidence of good reputation of all value whatever to appellants. Speaking of a similar case, where a lower court had said, "But I want to say to you that evidence of this nature should be taken with a great deal of caution, for a man may bear the very best of reputation and yet may secretly indulge in vice and crime. We often hear of cases * * *," the Circuit Court of Appeals for the Eighth Circuit said:

> "The latter part of the foregoing excerpt (commencing with the words 'But I want to say to you') contains, in our opinion, prejudicial error. By direct statement, innuendo, and suggestion, it in effect nullified the true rule as first stated, and made good reputation of doubtful

> value and probably a positive disadvantage to the defendant. Because of the generally accepted proposition that one of good reputation is less likely to commit crime than one of bad reputation, it has become appropriate and common for courts to charge the jury that good reputation, if proven, is a fact to be considered by the jury together with all the other facts and circumstances of the case, in reaching the ultimate conclusion of guilt or innocence. A statement of this brief kind, without elaboration, is, in our opinion, about all that can be profitably or safely said to a jury on the subject."
>
> *Perara v. U. S.*, 235 Fed. 515, 149 C.C.A. 61.

Finally, the court said, "if you are convinced beyond a reasonable doubt that the defendants or either of them, by the evidence, are guilty of the three counts or any of them, it is your duty and obligation to find said defendants or such one guilty, regardless of how good their reputation may have been." That is clearly not the rule, for, as we have just shown, evidence of good reputation can not be thus ignored.

We come now to consider the second instruction on the same subject. As said before, the court did not give the second *in lieu* of the first; it was stated rather to be "*in addition* to what I have said." And what he proceeded to say in the second did not qualify in any manner what he had previously said in the first. That left the first intact, with all its faults.

The second but made matters worse. Frankly, we believe the court had in mind to make evidence of good reputation a part of the case to be considered by the jury along with the other evidence in the case. But

the words chosen for the purpose were so inept that the jury could not have so understood them. At any rate, the last portion of the instruction cancelled out all merit in the court's good intention, for he plainly told the jury to use the evidence of good reputation if, and only if, it caused the jury to believe the defendants to be *not guilty*. That is indefensible. A defendant has never been required to prove himself not guilty in order to gain acquittal. He is entitled to an acquittal if only a reasonable doubt of his guilt exists in the mind of the jury. And good reputation, in conjunction with the other evidence, *may* generate such reasonable doubt, as we have heretofore shown.

Evidence of good character is of especial value to the appellants in this case, where the element of intent is so vital, and the denial of a proper instruction on the subject is such prejudicial error that this assignment alone would require reversal.

From the foregoing discussion of the facts and the law applicable thereto, and based upon the manifest errors of the trial court, we respectfully submit that the decision of the trial court must be reversed and remanded, with instructions to dismiss the action, or in the alternative, to grant appellants a new trial.

Respectfully submitted,

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APPENDIX

ASSIGNMENT OF ERROR VIII.

(R. 38-46)

VIII. The court erred in instructing the jury, because the following portions of the charge exceeded the bounds of fair comment and was highly prejudicial in that it was a biased, unfair and one-sided analysis of the evidence, and was argumentative:

> "In this case it is my recollection that Mr. Osawa testified that while he was in Tokyo, Japan, exhibit 9—which he says he brought with him from Tokyo, Japan, to Seattle on November 2nd—was handed to him by someone, from Mikuni-Shoko Company Limited of Tokyo, Japan. He says that he received that letter, as I remember it. That letter recites from the beginning, quote—it is addressed to 'Messrs. China Import and Export Company. As a consequence of our long business discussion with your representative, Mr. W. L. Chang, we wish—'. Now, in the light of all of the evidence of this case, if you believe that Mr. Osawa honestly believed that Mr. W. L. Chang was the business representative of the China Import and Export Company; in the light of all of the evidence that you have heard, do you believe that Mr. Osawa believed the statement in the last of that letter that the tanks were imported for local storage purposes in Shanghai?
>
> "In connection with that letter and in connection with all of the evidence in the case, if Mr. Osawa believed that the letter of July 4, 1941, signed by Hua Hsin Company was an honest order for the shipment of these tanks to Shanghai, do you reasonably think that he would have writ-

ten on July 15 to Mr. Takahashi to this effect: 'We sure are on a spot on the three tanks. I doubt if a day goes by that they don't call us or say something about them. If we could only get those three tanks out it would be a life saver and they would do almost anything for us.'

"And you are entitled in the light of your experience and your common sense to determine if Mr. Osawa honestly believed that the Hua Hsin Company was purchasing these tanks, if he wouldn't have made a statement in this communication to Mr. Takahashi to the effect that he was not willing to approve the credit account of $71,-700 claimed in the Hua Hsin Company.

"And you have a right in the light of all of the testimony to determine whether or not Mr. Osawa thought any portion of that letter of July 14, 1941, was an honest letter.

"As I remember the testimony, Mr. Osawa testified that while this plaintiff's exhibit 9 was brought to him by someone from the Miconi Shoko Company, that he never saw either of the letters I would like to find exhibit 17—dated July 16, 1941, addressed by Miconi-Shoko Company Limited of Tokyo, Japan, also to Seattle, Washington, but to the name Takahashi, instead of Chinese Import Company.

"In the light of all of the evidence that you have heard in this case and of the exhibits, do you believe that if the Mikuni-Shoko Company would take to Mr. Osawa this exhibit 9, instead of mailing it to the China Import Company at Seattle, that they wouldn't also take to Mr. Osawa exhibits 17 and 18? If you read exhibits 17 and 18, as I know you will, it will be for you to determine whether or not those two letters do not

show that it was the plan of the Mikuni-Shoko Company Limited or of Mr. Ikuta, its director, to merely use the Hua Hsin Company as a pretense.

"It will be for you to determine if the Mikuni-Shoko Company wished Mr. Osawa to have the one letter, why they wouldn't want him to have the other two letters.

"It is also for you to consider in the evidence—I would like to see the telegraph exhibits 10 to 13, inclusive—it is also for you to consider, in the light of all of the evidence, whether a business man of the experience of Mr. Takahashi, receiving these telegrams, under date of June 27 in code due and private, under date of June 28th in code duo, and under date of July 5th under code duo, code inverted and under date of July 8, 1941, under code duo, without realizing what the purpose of Mikuni-Shoko Company was, as you find from the evidence in the light of exhibits 17 and 18.

"Do you think it is reasonable that if a man with the experience of Mr. Takahashi, under date of June 27th, received a telegram from a company in Tokyo, which included this language, 'Do utmost to arrange earliest possible shipment by every possible means oil tanks and tubes. Our customers desire additional oil tanks. Telegraph prospect.' And if on or about the next date, by a telegram from the same Tokyo Company, dated June 28, 1941, he was advised as follows: 'Decided today name of firm is Hua Hsin Company, address 320 Szechuen Road, Shanghai, China,' whether or not he would think that that was an honest sale to the Hua Hsin Company in Shanghai, China, or whether those telegrams would give any possible inference except that Mr. Taka-

hashi was advised that the Mikuni-Shoko Company was telling him that they had decided to use the name of Hua Hsin Company?

"In the light of your experience, do you think that if this was an honest sale that the Mikuni-Shoko Company would not have used the words, 'Tanks have been sold to the Hua Hsin Company' instead of telegraphing Mr. Takahashi, 'Decided today name of firm is Hua Hsin Company' and the other language set forth in this telegram?

"My recollection of the evidence in this case is that Mr. Takahashi admitted that he had these four telegrams before he handed Mr. Leo Nye Sing the application of July 16, 1941. From the light of your experience and from the light of what Mr. Leo Nye Sing did in connection with this transaction with Hua Hsin Company, do you think that if Mr. Takahashi had deemed that that transaction was honest, that he would have agreed to pay three per cent *of* any per cent for someone to sign his name?

"It is for you to determine in the light of your experience whether, if Mr. Takahashi was endeavoring to sell these three tanks other than in the Orient at time when he understood he would be unable to ship them to the Orient, if that were any different than anyone would do; whether they were honest or dishonest, if they were not able to have tanks shipped to the Orient, when they had been ordered from that location.

"Under the evidence, as I remember it, the Mexico transaction as far as the contract is concerned, involved used plates, used steel plates.

"Under the evidence, as I remember it, the Mexico company executed an affidavit before a Mexican notary public and someone as a vice con-

sul signed a certificate to the effect that such Mexican notary public was a notary public. It is for you to determine in the light of all of the evidence whether actually that affidavit was true.

"That evidence has been introduced by the defendants upon the ground that it shows such good faith on the part of the defendants that they wouldn't be willing to violate any other law in the light of their action in that connection. You have a right in connection with the Mexican transaction to read and consider what Mr. Takahashi wrote as to the Mexican situation.

"It is also for you to determine whether or not the Mexican transaction shows such good faith that anyone acting as Mr. Takahashi did would not violate any other law or whether it shows, or whether you may reasonably infer that it shows that when the blacklisted firm was unable to receive any more steel plates, for whatever purpose it wished to receive them, that Mr. Takahashi cancelled the contract after it had been suspended by the Mexico Company.

"In testing the evidence of the case, you have a right and should consider all of the statements and all of the exhibits 19, and 21 and 29, relative to these tanks. You have a right to determine whether the defendant Takahashi or the defendant Osawa was honest in stating the specific purpose of the article and the address of the ultimate consumer in a foreign country.

"In the light of all of the evidence, do you believe that in exhibit 21, the application of July 16, 1941, that Mr. Takahashi believed that the specific purpose and the address of the ultimate consumer for storage purposes was Hua Hsin Company, Shanghai, China?

"With respect to exhibit 19, the application of April 16, 1941, it is for you to determine whether or not it was honestly believved by Mr. Takahashi the purpose of the articles and the name of the ultimate consumer for storage purposes by Mikuni-Shoko Company. In that connection you may consider that in exhibit 20 signed by Mr. Leo Nye Sing it was stated that the consignee was (illegible) Company, Mukden, China. And that the purpose was to be used on horse-drawn cooley wagons and carts, $25,000, 50,000 pieces of automobile roller bearings.

"The Kono and Company as the 'ultimate consumer to be sold to the trade as above explained.' In the light of that statement that those articles were to be sold to the trade as above explained, it is for you to determine whether or not the defendant Takahashi was frank and open with the Government in not stating, instead of the purpose of the ultimate consumer being storage purposes by Mikuni-Shoko Company—for sale by Mikuni-Shoko Company to the Japanese Army or Navy'." (R. 271-278)

At the trial the defendants, and each of them objected to these comments on the following grounds and took the following exceptions:

"Mr. Griffin (Counsel for defendant Osawa) excepted on the following grounds:

"The Court then advised the jury, in effect, that he was permitted to comment upon the evidence, and the Court did comment upon the evidence, but the comment of the Court, to which the defendant Osawa excepts, was not unbiased, was not fair, was not met by the Court with any favorable comment of any kind in behalf of the defendant Osawa, but the comment was unfair,

biased, prejudicial, without any endeavor at all to equalize the force of the comment, but made directly and with emphasis for the purpose of advising the jury that the Court, irrespective of what the Court said in the general instruction, that they should take nothing from it, to advise the jury that the Court desired a verdict of guilty in this case. Considering the comment made by the Court upon the evidence, an exception is taken to each and every comment made by the Court in that particular. I desire to point out that having so commented, the defendants were entitled to have an equal fair comment in so far as their rights were concerned, to suggest to the Court this: While the Court by its comment has sought a conviction, because the defendants are charged with desiring to tranship three tanks, from Shanghai, China, to Japan, the jury were entitled to be told that they also should consider this—there is no evidence in the case that Japan required these three tanks in Japan. The evidence is that at the time in question Japan controlled not only the port of Shanghai but all the ports of China. The evidence is with that situation existing, the United States government denied the application, that the jury has an absolute right to infer, even if the shipments were direct to the Japanese Army, that those storage tanks might be and would be as useful in Shanghai, China, where its armies were employed, as it would be to ship them to Japan and transport oil from Japan, 1500 miles to Shanghai.

"THE COURT: It is understood and the Court rules that each exception taken by Mr. Griffin on behalf of Mr. Osawa shall be deemed taken by Mr. Bassett in behalf of Mr. Takahashi.

"MR. BASSETT (Counsel for defendant Takahashi): Thank you. In addition to what counsel has said in taking an exception to the Court's commenting on the evidence, I wish to add that the comments were not only biased and prejudicial and unfair, and one-sided, but they were argumentative as well.

"THE COURT: I imagine that you would like all of the exceptions which Mr. Bassett has taken?

MR. GRIFFIN: Yes, I was just going to suggest that would round it out, then.

THE COURT: You may." (R. 280-282)

ASSIGNMENT OF ERROR IX.

(R. 46-48)

IX. The court erred in instructing the jury concerning evidence of defendants' good character and reputation.

> "There has been evidence introduced in this case as to the good reputation, that is, what people say as to the honesty or integrity of the defendants—and you shall give such testimony that weight as you believe it entitled to receive in determining whether or not the defendants are guilty as charged. But the jury will recognize that many men have borne good reputations, sometimes over many years, and have later been convicted of an offense which has existed for the same many years, during which every one thought they had a good reputation. And in this case, if you are convinced beyond a reasonable doubt that the defendants or either of them, by the evidence, are guilty of the three counts or any of them, it is your duty and obligation to find said defendants or such one guilty, regardless of how good their reputation may have been." (R. 279)

To which the defendants excepted as follows:

> "(MR. GRIFFIN). Also, the court went further and by his instructions wiped out all of the law of good reputation and honor, so far as the defendants are concerned, by his instruction that the jury could consider the reputation for what it is worth, but—as the jury knows, says the court—people with good requtation are guilty, and in this case, so and so and so. (R. 281)
>
> THE COURT: It is understood and the court rules that each exception taken by Mr. Griffin on

behalf of Mr. Osawa shall be deemed taken by Mr. Bassett on behalf of Mr. Takahashi.

MR. BASSETT: Thank you. (R. 281).

THE COURT: I am going to give some additional instructions, in the light of the exception you have taken, and if you wish, it may be understood you will have the right of exception to each one without the necessity of expressly taking them. Is that satisfactory?

MR. GRIFFIN: Yes.

MR. CRANDELL: Yes.

MR. BASSETT: Yes." (R. 282)

(After the jury returned) the court said:

"Members of the jury, supplementing the instructions on the law, that you must accept as the law, I wish to say this to you: *In addition to what I have said* with respect to the testimony in the case regarding the reputation of the defendants or either of them, the jury are instructed that if, in the light of all the testimony and in the light of the reputation testimony, they believe the defendants or either of them are *not guilty*, they have a right to base that verdict upon their interpretation of the testimony, together with reputation testimony, if in the jury's opinion such satisfies them that the defendants are *not guilty*. (Italics supplied)." (R. 282).

(After the jury again retired) the court said:

"Do you wish to note any exceptions—though I have in mind what has been said—do you wish to except to each and every thing that I have said to the jury at this time?

MR. GRIFFIN: I so understand.

MR. BASSETT: Yes.

MR. CRANDELL: Yes." (R. 284).